

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>JOHNNIE MCFALL, JR.</b>	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,004,169
	)	
<b>UNITED PARCEL SERVICE</b>	)	
Respondent	)	
	)	
AND	)	
	)	
<b>LIBERTY MUTUAL INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant requested review of the September 19, 2003 Award by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Appeals Board (Board) heard oral argument on March 2, 2004.

**APPEARANCES**

Scott J. Mann, of Hutchinson, Kansas, appeared for the claimant. John R. Emerson, of Kansas City, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. In addition, claimant advised the Board that the issue of interest under K.S.A. 44-512b was moot as respondent paid the balance of the Award following claimant's written demand.

**ISSUES**

At the regular hearing, the parties stipulated that claimant sustained a 42 percent permanent partial impairment to the body as a whole as a result of his compensable work-related injury. The value of the 42 percent impairment is \$65,152.08. The ALJ also apparently found that claimant was permanently and totally disabled.<sup>1</sup> The claimant, now retired, receives substantial retirement benefits from respondent which are offset against any

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<sup>1</sup> There was no express finding of fact within the body of the Award to this effect. But in the conclusion of the Award the ALJ states "[c]laimant is entitled to a permanent total disability award which has a statutory maximum of \$125,000 pursuant to K.S.A. 44-510f(a)(2)." (Award at 4.) In any event, the parties agree claimant is permanently and totally disabled under K.S.A. 44-510c.

workers compensation benefits under K.S.A. 44-501(h). The ALJ concluded that same statute contemplates a minimum payment for a functional impairment. Thus, she entered an Award for \$65,152.08, but went on to find that claimant's recovery was subject to the statutory limitation of \$50,000 set forth in K.S.A. 44-510f(a)(4).

The claimant requests review of this decision alleging the ALJ erred in applying the statutory cap set forth in K.S.A. 44-510f(a)(4). Specifically, claimant contends that K.S.A. 44-510f(a)(4) does not limit his recovery as he is permanently and totally disabled. Thus, claimant maintains he is entitled to an Award for the entire value of the 42 percent impairment.

Respondent argues the ALJ was correct in applying the statutory limits set forth in K.S.A. 44-510f(a)(4) and as a result, the Award should be affirmed in all respects.

The sole issue for the Board to address is the application of K.S.A. 44-510f(a)(4).

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant sustained an accidental injury on October 10, 2001 when a bundle of metal rods weighing approximately 85 pounds fell on his right foot. Before the accident, claimant had been a high functioning diabetic and kept his blood sugar under control without the need for insulin. Following the October 10, 2001 accident, his health took a dramatic turn. The injury to his right foot did not heal and, on January 25, 2002, he had a mid-foot amputation. On February 15, 2003, his left lower leg was amputated, and during his hospital stay he developed a large bed sore on his buttocks. Claimant is now insulin dependent and suffers from other significant respiratory complications.

Claimant never returned to work but was able to retire in November 2002 with a pension that was funded solely by respondent.<sup>2</sup> He is presently unemployed and respondent concedes claimant is permanently and totally disabled pursuant to K.S.A. 44-510c. Both parties have agreed, based upon the medical opinions offered by Dr. Philip R. Mills, that claimant sustained a 42 percent permanent partial impairment to the body as a whole as a result of his October 10, 2001 accident.<sup>3</sup>

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<sup>2</sup> The parties agree the weekly value of this pension is \$461.64.

<sup>3</sup> Respondent does not dispute the causal connection between the October 10, 2001 accident and claimant's subsequent amputations. The uncontroverted medical evidence indicates the accident was the precipitating factor that led to the cascade of events that followed, including the amputation of claimant's left lower leg.

This appeal considers whether K.S.A. 44-510f limits claimant's recovery to \$50,000. K.S.A. 44-510f states in part:

(a) Notwithstanding any provision of the workers compensation act to the contrary, the maximum compensation benefits payable by an employer shall not exceed the following:

...

(4) for permanent partial disability, where functional impairment only is awarded, \$50,000 for an injury or aggravation thereof.<sup>4</sup>

In his brief, claimant asserts this statute does not apply because he is not permanently and *partially* disabled, as defined by K.S.A. 44-510e(a).<sup>5</sup> Rather, claimant contends he is permanently and *totally* disabled as a result of his work-related accident and therefore, his recovery is not limited by the provisions of K.S.A. 44-510e(a).

The Board recently considered this issue and concluded that when a claimant is found to be permanently and totally disabled, the statutory cap in K.S.A. 44-510f(a)(4) does not apply.<sup>6</sup> The statutory language refers to permanent partial impairments and makes no reference to those injuries that are serious enough in nature to render a claimant permanently and totally disabled under K.S.A. 44-510c. This language is clear and unambiguous.

Here, the parties have stipulated claimant is permanently and totally disabled. Thus, the Board finds the statute does not apply and the ALJ erred in applying the \$50,000 statutory cap. The Board reverses that aspect of the ALJ's Award and finds that claimant is entitled to the statutory maximum benefit of \$125,000 subject to the retirement offset set forth under K.S.A. 44-501(h). In this instance, claimant's weekly retirement benefit exceeds the weekly value of his Award. Nonetheless, K.S.A. 44-501(h) specifically provides for the minimum payment of the employee's functional impairment, which in this case is a stipulated 42 percent impairment to the body as a whole. Accordingly, claimant is entitled to an Award of \$65,152.08, less any sums previously paid.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated September 19, 2003, is reversed and modified as follows:

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<sup>4</sup> K.S.A. 44-510f(a)(4)(Furse 2000)

<sup>5</sup> Claimant's Brief at 8 (emphasis added).

<sup>6</sup> *Wells v. Waffle House, Inc.*, No. 264,018, 2003 WL 22401256 (Kan. WCAB Sept. 25, 2003) (Appeal filed with the Kansas Court of Appeals on November 13, 2003).

The claimant is entitled to the statutory maximum benefit of \$125,000 subject to the retirement offset set forth under K.S.A. 44-501(h). In this instance, claimant's weekly retirement benefit exceeds the weekly value of his Award. Accordingly, claimant is entitled to an Award of \$65,152.08, less any sums previously paid.

The claimant is entitled to 58 weeks of temporary total disability compensation at the rate of \$417 per week or \$24,186 followed by 156.24 weeks of permanent partial disability compensation at the rate of \$417 per week or \$65,152.08 for a 42% functional disability, making a total award of \$89,338.08.

As of March 02, 2004 there would be due and owing to the claimant 58 weeks of temporary total disability compensation at the rate of \$417 per week in the sum of \$24,186 plus 66.86 weeks of permanent partial disability compensation at the rate of \$417 per week in the sum of \$27,880.62 for a total due and owing of \$52,066.62, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$37,271.46 shall be paid at the rate of \$417 per week for 89.38 weeks or until further order of the Director.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March, 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant  
John R. Emerson, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director